STATE OF MICHIGAN

COURT OF APPEALS

SUSAN L. LABUTTE,

Plaintiff-Appellee/Cross Appellant,

v

TODD D. LABUTTE,

Defendant-Appellant/Cross Appellee.

UNPUBLISHED
February 7, 2003

No. 230915
Livingston Circuit Court
LC No. 98-000406

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals and plaintiff cross appeals a judgment of divorce entered in the Livingston Circuit Court. We affirm in all respects.

I. Facts

Plaintiff and defendant knew each other since the sixth grade and re-united at their five-year class reunion from high school in 1986 and started dating. Prior to the reunion, defendant concentrated his efforts in his lawn care and maintenance business, which he started in 1978 when he was fifteen years old with his younger brother. The business started to develop and defendant and his brother expanded into fertilization, hydro seeding, irrigation systems and custom landscaping. On December 3, 1986, Todd's Services, Inc. was formed, TSI.[1] Plaintiff had attended college and was working.

In February 1987, plaintiff and defendant became engaged. Plaintiff then quit her job to plan the wedding, the honeymoon and to renovate two properties[2] that defendant had bought prior to the marriage. On November 26, 1988, plaintiff and defendant were married. In the beginning of the parties' marriage, they would spend one month in Florida each year. Later in the marriage, the parties would spend approximately four months a year there. In October 1996,

[1] At the time of trial, there were three separate entities that made up TSI; Todd's Services Realty and Rental, Todd's Services Landscaping and Restoration, and LaButte Air.

[2] These properties are referred to in this opinion as the "Gallagher home" and the "Apache home."

the parties bought a home in Florida. During the marriage, defendant concentrated on his business, while plaintiff concentrated on the domestic affairs. On October 5, 1998, after approximately ten years of marriage, defendant told plaintiff that he wanted a divorce. Plaintiff and defendant had no children during the marriage.

II. Analysis

A. Valuation of the Assets and Property Distribution

Defendant alleges that the trial court erred in awarding plaintiff one-half appreciation in the value of defendant's business that occurred during the marriage. We disagree. A trial court's findings of fact, including its findings in determining valuation of marital assets, are reviewed for clear error. *Sullivan v Sullivan*, 175 Mich App 508, 510; 438 NW2d 309 (1989). Absent clear error, we must determine if the dispositional ruling was fair and equitable in light of the circumstances. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Quade v Quade*, (*On Remand*), 238 Mich App 222, 224; 604 NW2d 778 (1999). "This dispositional ruling is discretionary and should be affirmed unless this Court is left with a firm conviction that the division was inequitable." *Quade, supra* at 224.

The distribution of marital property by the trial court is governed by statute. MCL 552.19; *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). MCL 552.19 provides:

> Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money.

"When apportioning marital property, the court must strive for an equitable division of increases in marital assets 'that may have occurred between the *beginning* and the end of the marriage.'" *Reeves, supra* at 493, quoting *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986) (emphasis added.)

This state recognizes a distinction amongst marital and separate assets when apportioning marital property. *Reeves, supra* at 494. Generally, each party takes away from the marriage any assets that were separate assets prior to the marriage. *Id.* However, there are two statutory exceptions to this rule. *Id.* First, MCL 552.23 provides that, if the "estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . . the court may further award to either party the part of the real and personal estate of either party . . ." Second, MCL 552.401 provides that a court may award "to a party all or a portion of the property, either real or personal, owned by his or her spouse, as . . . the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property." Further, when determining an appropriate division of property "[a]mong the equitable factors to be considered are the source of the property; the parties' contributions toward its acquisition, as well as to the general marital estate; the duration of the marriage; the needs and circumstances of the parties; their ages, health, life status, and earning abilities; the cause of the divorce, as well as past relations and conduct between the parties; and

general principles of equity." *Hanaway v Hanaway*, 208 Mich App 278, 292-293; 527 NW2d 792 (1995). "In addition, the court may consider the interruption of the personal career or education of either party." *Hanaway, supra* at 293.

The trial court found that because defendant's interest in his business entities appreciated during the marriage and plaintiff contributed to the marriage by being a homemaker, managing two homes, and being supportive of defendant who worked an unusually long and unique schedule, that the appreciation in value of the business was transformed into a marital asset. A spouse's handling of the child rearing and the domestic duties is enough to invade an otherwise separate estate. *Hanaway, supra* at 294.

Upon reviewing the record, plaintiff, although childless, did contribute significantly to the domestic affairs of the relationship, thereby enabling defendant to concentrate his efforts towards the family business. During the marriage, plaintiff administered the household physically and financially. Plaintiff was responsible for all of the household duties and prepared the meals during the marriage. Additionally, plaintiff did all of the parties' personal shopping and planned all of their vacations and social events. Moreover, plaintiff worked closely with the architect and the builder while the Gallagher home was being designed and constructed. Plaintiff also renovated and redecorated both the Apache home and the Florida home. Financially, plaintiff was responsible for paying the bills. While plaintiff administered the household, defendant worked very long hours. Consequently, TSI and its related entities appreciated during the marriage due to arduousness of plaintiff in her contribution to the household, which enabled defendant to invest the time and effort necessary to maintain and promote his business. Accordingly, the trial court did not err in determining that the appreciation of TSI during the marriage was a marital asset.

Additionally, defendant alleged that even if plaintiff had an indirect contribution to the business' appreciation, that contribution did not amount to 50% of the value. However, during trial, defendant took a no contest position regarding fault and allowed the court, in the distribution of the assets, to make whatever allocation it deemed appropriate. Under these circumstances, we cannot find clear error in the trial court's conclusion that an equal distribution was appropriate.

Defendant next contends that the trial court erred in its valuation of defendant's premarital and marital share of TSI.

"A trial court has great latitude in determining the value of stock in closely held corporations, and where a trial court's valuation of a marital asset is within the range established by the proofs, no clear error is present." *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994); *Rickel v Rickel*, 177 Mich App 647, 650; 442 NW2d 735 (1989). Further, it is not error for a trial court to make its own valuations if both parties' "experts varied widely and were the subject of much dispute at trial." *Jansen, supra* at 171; *Rickel, supra* at 650. Moreover, a trial court's calculations when determining valuation need not have mathematical precision if the valuation falls within the proofs presented. *Id.*

On March 31, 1997, TSI's accountant calculated that defendant's share of the company was worth $2,060,000. On December 31, 1998, plaintiff's expert determined defendant's share in TSI and its related entities was $3,522,000. On November 9, 1999, defendant's expert

testified that defendant's share in Todd's Services was $961,000.[3] Upon reviewing the record, there was a substantial difference in how plaintiff's and defendant's experts prepared their valuations of TSI and its related entities.

The trial court valued TSI and its related entities at $2,060,000. This figure fell between plaintiff's and defendant's experts valuations. The trial court rationalized that this value was prepared approximately nine months prior to the parties separation, and reflected the current financial condition of the corporation, not in contemplation of a divorce. Upon reviewing the lower court record, the trial court's valuation of the marital valuation of TSI and its related entities was within the range of the proofs presented. *Jansen, supra* at 171; *Rickel, supra* at 650.

Moreover, plaintiff's expert determined that the premarital value of TSI was $166,000. Defendant's expert did not testify regarding a premarital value of TSI. However, defendant testified that the premarital value of TSI would have been $300,000 to $325,000. An additional valuation expert testified that the premarital value based upon the hard data given by both plaintiff's and defendant's experts were approximately $220,000 to $440,000. The trial court adopted defendant's trial testimony that the premarital value of TSI was $300,000. Again, the trial court's valuation of the premarital valuation of TSI and its related entities was within the range of the proofs presented.[4] *Jansen, supra* at 171; *Rickel, supra* at 650.

Defendant next alleges that the trial court erred in its valuation of the Gallagher home. We disagree. Specifically, defendant asserts that the trial court erred by rejecting both plaintiff's and defendant's expert appraisals and relying upon a "Comparative Analysis and Marketing Plan" offered by a real estate agent interested in selling the property. The trial court found that the value of the Gallagher residence was $1,750,000 on the basis of defendant's trial testimony. Defendant testified at trial that he had Lady of the Lakes Realty perform a market analysis of the Gallagher residence because they sell 70-80% of all the property on the "chain of lakes." Lady of the Lakes Realty recommended the listing price of the Gallagher residence to be $1,750,000, which defendant testified was a fair and reasonable price for the Gallagher residence. This Court cannot reverse a trial court's factual findings, if upon reviewing the evidence pertaining to valuation of an asset, the valuation was plausible. *Everett v Everett*, 195 Mich App 50, 52; 489 NW2d 111 (1992); *Thames v Thames*, 191 Mich App 299, 301-302; 477 NW2d 496 (1991).

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[3] This figure did not include defendant's interest in LaButte Air, Inc., which was determined to be $192,000, or defendant's interest in Todd's Services Realty & Rental LLC, which was determined to be $102,000.

[4] Although defendant alleges that the trial court should have reduced TSI's accountant's figure by $150,000 because of the inflated valuation due to the Ameritech contract, the trial court's valuation still fell within the proofs at trial. *Jansen, supra* at 171. Additionally, defendant alleges that the $300,000 pre-marital valuation that he testified to at trial was based on a current valuation of TSI as $1,000,000. However, the lower court evidence does not support this contention. Defendant testified that the premarital value of TSI was approximately $600,000 to $650,000. Defendant never stated during trial that this valuation was based upon the current valuation of TSI as $1,000,000. Further, $300,000 falls within the proofs of trial. *Jansen, supra* at 171. The trial court was aware of the factual issues surrounding the business evaluations and the trial court appropriately explained its findings resolving those issues.

Therefore, upon reviewing the record, the trial court's determination was plausible and within the range of the values provided by the parties.

Additionally, defendant alleges that the trial court erred in not reducing the value of the Gallagher residence based upon the real estate commission and closing cost connected with the potential sale of the home. Although a trial court *may* consider, if not speculating in doing so, the effects of realtor fees when distributing marital assets, it is not obligated to do so. *Nalevayko v Nalevayko,* 198 Mich App 163, 164; 497 NW2d 533 (1993) (emphasis added). Therefore, the trial court's failure to consider realty fees was not erroneous.

Defendant also alleges that the trial court erred in not awarding defendant the value of the appreciation of the land of the Gallagher residence during the marriage. "The sharing and maintenance of a marital home affords both spouses an interest in any increase in its value (whether by equity payments or appreciation) over the term of a marriage." *Reeves, supra* at 495. The trial court found that defendant purchased the Gallagher home just prior to the marriage for $215,000, with a $20,000 down payment on a 5% land contract. The trial court found that when the property was sold, five months after the marriage on April 19, 1989, it had appreciated an additional $35,000. The trial court awarded defendant $55,000 as a total premarital contribution to the Gallagher property. The parties repurchased the home in August 1994, and demolished the house and began construction on a new home on the property. Defendant alleges that because he was responsible for renovating and cleaning up the land where the marital residence sits, that he alone should receive the appreciation of the land during the marriage. However, whether defendant was responsible for maintaining the land, and plaintiff responsible for maintaining the residence does not change the fact that as a whole it was shared marital property, thereby affording both spouses any appreciation in value. Therefore, upon reviewing the evidence, the trial court did not err in its disposition of the Gallagher property.

Defendant also alleges that the trial court erred in failing to recognize defendant's entire premarital investment on the Apache home, which included not only the $50,000 down payment, but the $110,000 in renovations. We disagree.

Although defendant cites *Reeves, supra,* in which this Court reversed the trial court's decision to treat a down payment on a condominium and increase in equity that accrued prior to the marriage as marital property, this case can be differentiated from the present case. *Reeves, supra* at 495-496. In the present case the trial court did not treat the $110,000 as part of the marital estate, but rather invaded defendant's separate estate due to plaintiff's contribution and assistance in the growth of the Apache home. "When one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Reeves, supra* at 495; see also MCL 552. 401.

The trial court found that although defendant spent $110,000 to renovate the Apache home prior to the marriage, that plaintiff contributed to the improvement of the property, and therefore, the trial court only considered the $50,000 down payment as defendant's separate premarital contribution. The trial court explained that "[p]laintiff put numerous hours of time into redecorating the Apache home. Further, she contributed to the improvement and accumulation of the property, even though she may not have provided any money for the same." Plaintiff carpeted, painted, wallpapered and worked on the interior and exterior of the house. Therefore, although defendant provided the actual money to provide the renovations, plaintiff

clearly provided labor to assist in the renovations of the home. Thus, the trial court did not err in concluding that plaintiff assisted in the improvement and accumulation of the Apache home.

B. Attorney Fees

Defendant also asserts on appeal that the trial court abused its discretion in awarding attorney fees to plaintiff. We disagree. In a divorce action, the trial court has discretion, pursuant to MCL 552.13, to award attorney fees. MCL 552.13; *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). We review the award of attorney fees for an abuse of discretion. *Stoudemire, supra* at 344.

A trial court in a divorce action may require either party "to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency." MCL 552.13(1). MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay.

Moreover, attorney fees "may also be awarded when the party requesting payment has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation." *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997); *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992).

Plaintiff requested an award of $150,000 in attorney and expert witness fees, claiming that this amount would only partially satisfy the $225,000 she claimed to have been charged as a combination of the two. The trial court ordered defendant to pay $50,000 to plaintiff's attorneys. The trial court referenced the fact that a tremendous amount of money was expended for legal and expert witness fees throughout the divorce proceeding, and thus, concluded that based upon the discrepancy of income of plaintiff and defendant, tempered by the trial court's belief that most of the expenses were unnecessary, defendant was ordered to pay $50,000 to plaintiff's attorneys.

Defendant unduly burdened the trial court with the multiple show cause hearings that plaintiff had to file to receive her monthly support ordered by the trial court. Moreover, "[a] party may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). This Court has continuously held that a trial court does not abuse its discretion by awarding attorney fees to a party that has received substantial assets and alimony in a divorce settlement. *Atkinson v Atkinson*, 160 Mich App 601, 612; 408 NW2d 516 (1987); *Rapaport v Rapaport*, 158 Mich App 741, 751-752; 405 NW2d 165 (1987) modified 429 Mich 876 (1988); *Bone, supra* at 840. Further, where the parties incomes are disproportionate, thus showing a need for financial assistance, the awarding of attorney fees does not result in an abuse of discretion. *Atkinson, supra* at 612; *Bone, supra* at 840. Plaintiff did not have a job at the time of trial and therefore, it was unlikely that she could bear the vast amount of attorney fees that were incurred in this case.

The trial court referenced the fact that plaintiff had been absent from the working environment for the term of the marriage at the request of defendant and would need a period of time for rehabilitation. Accordingly, the trial court did not abuse its discretion in awarding attorney fees.

C. Alimony

Defendant next contests the trial court's award of alimony. Specifically, defendant alleges that the circumstances did not justify the amount or duration of the award. We disagree. An award of spousal support is within the trial court's discretion. MCL 552.23; *Ianitelli v Ianitelli*, 199 Mich App 641, 642; 502 NW2d 691 (1993). A trial court's factual findings concerning alimony are reviewed for clear error. *Moore v Moore*, 242 Mich App 652, 654-655; 619 NW2d 723 (2000). Absent clear error, we must conclude "whether the dispositional ruling was fair and equitable in light of the facts." *Id.*

"The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore, supra* at 654. There are many factors a trial court may consider when determining whether to grant spousal support, including "the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health, and fault, if any." *Ianitelli, supra* at 643.

In the instant case, the trial court found that defendant took a no contest position approach to fault. The trial court further noted that defendant has the ability to earn at least $300,000 per year and fully able to pay alimony. The trial court also concluded once defendant has the ability to put his full attention on his business, which he has continued to expand, his earning potential will significantly increase. The trial court additionally explained that, since defendant preferred plaintiff to be a homemaker, her present situation is not as comforting as defendant's situation. Plaintiff will no longer have access to the amenities of the estate at Marco Island, Florida, and will be required to re-establish herself in the workforce, as well as make significant lifestyle changes. The trial court rationalized that while defendant will be able to continue the lavish lifestyle the couple had established over the last five years, plaintiff does not have the earning ability to continue to live prosperously. Lastly, the trial court recognized that plaintiff will need a period of time for rehabilitation.

The trial court considered all of the various factors necessary in determining whether to grant alimony. The trial court made factual determination and accordingly, awarded alimony. These factual determinations were supported by the evidence. Therefore, the trial court did not err in awarding spousal support under the circumstances of this case.

D. Cross Appeal

The final argument on appeal is that the trial court erred by making an inequitable distribution of the marital assets. We disagree. Specifically, plaintiff asserts that the trial court omitted from the marital estate an equitable life insurance policy with a cash value of $17,461. Although, the trial court failed to address this equitable life insurance policy, this error was harmless. In the divorce judgment, the trial court ordered the termination of all life insurance policies upon the life of the other party payable to the respective estates. The trial court's decision as a whole was fair and equitable.

Further, plaintiff asserts that the trial court erred in omitting from the marital estate $50,000 which defendant withdrew from the parties' joint account in December 1998. Defendant testified that both he and his brother were responsible for paying TSI $100,000 for over compensation in 1998, so the $50,000 was merely a "payback of over-compensation." Plaintiff alleges that the "disposition of these funds were highly suspect." Moreover, plaintiff also alleges that the trial court erred in omitting $450,000 of the Gallagher mortgage because the money was given to defendant's brother due to the fact that defendant withdrew an unequal share of money from the business, and therefore needed to equalize his brother's income. Plaintiff alludes to the fact that this money was not used to equalize the income of defendant's brother. However, both of these assertions amount to credibility determinations. Credibility determinations are for the trier of fact to ascertain. *Lumley v U of M Bd of Regents*, 215 Mich App 125, 136; 544 NW2d 692 (1996).

Plaintiff also asserts that the trial court erred in requiring each of the parties to pay one-half of any capital gains and losses on their respective 1999 returns. The trial court clarified at the motion hearing on October 2, 2000, that each party would be responsible for one-half of the tax liability arising from the investments made in the Prudential account. The trial court found that both plaintiff and defendant were responsible for the breakdown of the marriage. Therefore, the trial court's even split of the capital gains and losses for the 1999 returns on their investment account is neither unfair nor inequitable in light of the evidence presented.[5]

III. Conclusion

In sum, the trial court did not err in awarding plaintiff one-half appreciation in the value of defendant's business that occurred during the marriage. The trial court did not err in its valuation of the Gallagher property, the Apache home, or defendant's premarital and marital share of TSI. Additionally, the trial court did not abuse it discretion in awarding attorney fees to plaintiff. Furthermore, the trial court did not err in awarding spousal support under the circumstances of this case. Lastly, the trial court did not err in making inequitable distributions of the marital assets.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

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[5] Plaintiff also contends that the trial court omitted defendant's 401(k) and Prudential IRA account from the estate, however, plaintiff provides no legal justification pertaining to why these assets should be included as part of the marital estate. Further, plaintiff asserts that defendant's separate 1998 tax refund, received in 1999, was part of the marital estate, however, plaintiff fails to provide any legal authority to back up the assertion that a tax return filed separately while a divorce was pending is considered part of the marital estate. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Speaker-Hines v Treasury Dep't*, 207 Mich App 84, 90-91; 523 NW2d 826 (1994). Therefore, these issues will not be addressed on appeal.